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No. 08-____

IN THE

Supreme Court of the United States

MAN-SEOK CHOE,
Petitioner,

v.

ADAM N. TORRES, U.S. Marshal,
in his official capacity,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Since 1790, federal law has provided that a statute of limitations for a federal crime is tolled for any person "fleeing from justice." 18 U.S.C. § 3290. This Court nonetheless has never construed that term, and there continues to be a "direct conflict among the Circuits" as to whether "mere absence from the place of the offense" is enough to constitute "fleeing from justice," or whether "flight with intent to avoid arrest or prosecution" is required. *Jhirad v. Ferrandina*, 486 F.2d 442, 444 (2d Cir. 1973); *see also United States v. Florez*, 447 F.3d 145, 150-51 (2d Cir. 2006) (noting conflict).

A grant of the petition will allow the Court to resolve that conflict by answering the questions the petition presents:

1. Whether the "fleeing from justice" proviso in 18 U.S.C. § 3290 requires the government to prove flight with intent to avoid arrest or prosecution; and
2. If 18 U.S.C. § 3290 does require such intent, what conduct is necessary to prove it.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were Man-Seok Choe and Adam N. Torres, U.S. Marshal, in his official capacity.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	vi
OPINIONS AND ORDERS BELOW	1
JURISDICTION	2
TREATY AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT	3
A. History of the Case	3
B. The Opinion of the Court of Appeals	7
REASONS FOR GRANTING THE WRIT	8
I. THE CIRCUITS ARE DIVIDED OVER WHAT CONSTITUTES "FLEEING FROM JUSTICE" AND WHAT THE GOVERNMENT MUST PROVE TO ESTABLISH IT	9
A. The History, Text, and Purpose of the 18 U.S.C. § 3282 Statute of Limitations and the 18 U.S.C. § 3290 "Fleeing from Justice" Tolling Provision	9
B. This Court Has Never Authoritatively Construed the "Fleeing from Justice" Tolling Provision, Nor Decided What the Government Must Prove to Apply It	11

TABLE OF CONTENTS—Continued

Page

C. There Is a Direct Conflict Among the Courts of Appeals 11

II. THE QUESTIONS PRESENTED ARE IMPORTANT AND WARRANT THIS COURT'S REVIEW 14

CONCLUSION 19

APPENDIX

Decision of the United States Court of Appeals for the Ninth Circuit (April 29, 2008) 1a

Order of the United States Court of Appeals for the Ninth Circuit Denying Rehearing and Rehearing en Banc (September 16, 2008) 15a

Order of the Ninth Circuit Court of Appeals Granting Appellant's Motion for Stay of Mandate (September 29, 2008) 16a

Order of the United States District Court, Central District of California, Denying the Petition for Writ of Habeas Corpus Challenging Order Certifying Extradition (November 6, 2006) 17a

Memorandum and Order of the United States District Court, Central District of California, Western Division, Granting Request for Extradition and Committing Fugitive to Custody (October 10, 2006) 19a

TABLE OF CONTENTS—Continued

	Page
Statement of Confirmation of Kwang Soo Oh of the Korean Supreme Prosecutor's Office (June 10, 2005)	46a
Declaration of Chaibong Hahm (August 1, 2006)	49a
Declaration of Ung Lee (June 2, 2006)	54a
Declaration of Virginia P. Prugh (October 12, 2005)	55a

TABLE OF AUTHORITIES

CASES Page

Brouse v. United States, 68 F.2d 294 (1st Cir. 1933)..... 13, 16
Caplan v. Vokes, 649 F.2d 1336 (9th Cir. 1981).....10, 13, 14, 16
Donnell v. United States, 229 F.2d 560 (5th Cir. 1956).....11, 13, 15, 16
Ferebee v. United States, 295 F. 850 (4th Cir. 1924)..... 13
In re Assarsson, 687 F.2d 1157 (8th Cir. 1982)..... 13
Jhirad v. Ferrandina, 486 F.2d 442 (2d Cir. 1973)..... i, 12, 16
McGowen v. United States, 105 F.2d 791 (D.C. Cir. 1939)..... 13
Ross v. U.S. Marshal, 168 F.3d 1190 (10th Cir. 1999).....12, 13, 16
Streep v. United States, 160 U.S. 128 (1895).....9, 11, 12, 13
Toussie v. United States, 397 U.S. 112 (1970)..... 10
United States v. DiSantillo, 615 F.2d 128 (3d Cir. 1980) 19
United States v. Florez, 447 F.3d 145 (2d Cir. 2006)..... i, 12, 13
United States v. Fonseca-Machado, 53 F.3d 1242 (11th Cir. 1995)..... 13
United States v. Gonsalves, 675 F.2d 1050 (9th Cir. 1982)..... 14
United States v. Greever, 134 F.3d 777 (6th Cir. 1998)..... 13
United States v. Marion, 404 U.S. 307 (1971)..... 10

TABLE OF AUTHORITIES—Continued

Page

United States v. Marshall, 856 F.2d 896 (7th Cir. 1988) ..... *passim*

United States v. Morgan, 922 F.2d 1495 (10th Cir. 1991) 10, 19

United States v. O'Brian, 27 F. Cas. 212 (Cir. Ct., D. Kan. 1873) 16

United States v. Parrino, 180 F.2d 613 (2d Cir. 1950) 16, 17, 18

United States v. Wazney, 529 F.2d 1287 (9th Cir. 1976) 7, 14

STATUTES

18 U.S.C. § 3282 ..... *passim*

18 U.S.C. § 3290 ..... *passim*

28 U.S.C. § 1254(1) 2

Act for the Punishment of certain Crimes against the United States, ch. IX, § 32, 1 Stat. 112, 119 (1790) 9

TREATIES

Extradition Treaty Between the Government of the United States of America and the Government of the Republic of Korea, June 9, 1998, Article 6 ..... 2, 6, 7, 14

OTHER AUTHORITIES

Kurtis A. Kemper, *What Constitutes "Fleeing from Justice" Within Meaning of 18 U.S.C.A. § 3290 Which Provides That No Statute of Limitations Shall Extend to Persons Fleeing from Justice*, 148 A.L.R. Fed. 573 (1998) 12

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Man-Seok Choe respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS AND ORDERS BELOW

The decision of the court of appeals, affirming in relevant part the district court's denial of petitioner's habeas corpus petition challenging certification of his extradition to the Republic of Korea (1a-14a), is reported at 525 F.3d 733. The following decisions and orders are unreported, and are reprinted in the Appendix to the petition at the pages specified: the

court of appeals' order denying rehearing and rehearing en banc (15a); the court of appeals' order staying the mandate pending the filing of a petition for a writ of certiorari (16a); the minute order of the district court denying the habeas corpus petition challenging the magistrate judge's memorandum and order certifying the crimes for extradition (17a-18a); and the memorandum and order of the magistrate judge (19a-45a).

JURISDICTION

The court of appeals entered its judgment on April 29, 2008, and denied petitioner's timely request for rehearing and rehearing en banc on September 16, 2008. On September 29, 2008, the court of appeals granted petitioner's motion for stay of mandate, to and including December 15, 2008, pending the filing of this petition. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

TREATY AND STATUTORY PROVISIONS INVOLVED

Article 6 of the Extradition Treaty Between the Government of the United States of America and the Government of the Republic of Korea, June 9, 1998 ("Treaty" or "Extradition Treaty") provides:

> Extradition may be denied under this Treaty when the prosecution or the execution of punishment of the offense for which extradition is requested would have been barred because of the statute of limitations of the Requested State had the same offense been committed in the Requested State. The period during which a person for whom extradition is sought fled from justice does not count towards the running of the statute of limitations. Acts or circumstances that would

> suspend the expiration of the statute of limitations of either State shall be given effect by the Requested State, and in this regard the Requesting State shall provide a written statement of the relevant provisions of its statute of limitations, which shall be conclusive.

Section 3282 of United States Code Title 18 provides in relevant part:

> Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

Section 3290 of United States Code Title 18 provides that "[n]o statute of limitations shall extend to any person fleeing from justice."

STATEMENT

Petitioner Man-Seok Choe has been a United States lawful permanent resident alien since he moved to this country from Korea more than 38 years ago. (19a.) Choe settled in Los Angeles, where he continues to live with his wife and adult son. (17a.) Choe owns and operates a real estate investment company that he started in 1992. (47a.)

A. The History of the Case

1. Choe maintained business and political ties to Korea after he moved to the United States. He actively supported former President Kim Young-sam (Y.S. Kim), and traveled frequently to Korea on business in the 1990s. (2a, 51a.) In the early 1990s, Korea began development of a high-speed national transit railway system and solicited bids for a

contract to supply the rail cars for the system. (21a.) Alsthom Company, a multi-national corporation based in France that builds rail cars, requested advice from Ki Choon Ho as to whom it might hire as a lobbyist to represent its interests in bidding for the contract. (22a.) Ho was referred to Choe and she in turn introduced Choe to the Alsthom Korea CEO, whom Ho later married. (22a.)

Alsthom hired Choe and Ho as lobbyists. (22a.) Their agreement with Alsthom provided for payment of a commission if Alsthom won the contract. (22a.) Choe lobbied government officials. (22a.) Alsthom, whose bid included a transfer technology provision as well as construction of the rail cars in Korea, was awarded the contract in 1994. (22a, 54a.) Alsthom paid Choe and Ho a commission of $11 million. (22a.) Alsthom wire transferred the funds to Choe's Hong Kong bank account, and Choe then wire transferred Ho her share of the commission. (22a.)

2. In June 1995, police in Hong Kong notified Korean police of the wire transfers, and Korean authorities initiated an investigation, reportedly to ensure the funds were not drug-related. (23a.) Korean police officer Yoon Ki Jeon interviewed Ho. (23a.) No further official action was taken and the investigation was closed. (24a.)

Kim Dae-jung (D.J. Kim) won the Korean presidency in 1997, replacing his bitter rival Y.S. Kim, with whom Choe was closely aligned. (47a, 51a-53a.) The following year, the Korean Supreme Prosecutor's Office began an investigation into Alsthom's successful contract bid during the presidency of Y.S. Kim. (24a.)

3. On October 2, 1999, Choe was stopped at the airport in Korea, as he was about to board a return flight to the United States. (24a.) Unbeknownst to Choe, Korean prosecutors had obtained a 30-day departure prohibition on September 28. (24a.) Choe's passport was confiscated and he was questioned by Korean prosecutors on two occasions. (24a.) The prosecutors asked him about their 1995 investigation into his and Ho's role in assisting Alsthom in securing the rail car contract, and the alleged premature closing of the investigation due to payments Ho made to the police. (24a.) Choe gave a statement and was released. (24a.)

4. After the departure prohibition expired, Choe did not ask to have his confiscated passport returned, and departed without informing Korean authorities. (12a, 24a.) When he left Korea, there was no prosecution or charges pending against him. (12a, 43a.) Choe made no attempt to conceal or disguise his identity or his whereabouts upon his return home to Los Angeles. (13a.) He continued to reside openly at his prior known home address, to operate the real estate investment company he had founded in 1992, and to maintain significant ties to the community. (13a, 47a.) Choe applied for U.S. citizenship in 2001 and the application remains pending. (13a, 47a.)

Korean prosecutors questioned Ho in April 2000 about the payments she had received from Choe and the closure of the investigation in 1995. (35a-36a.) Ho told the prosecutors she had paid a bribe to have the investigation closed in 1995. (36a-37a.) She also told the prosecutors that a transfer of funds Choe had made to her account in March 1996 represented reimbursement to her for Choe's half of the bribe that she allegedly paid Officer Jeon. (37a.) Ho was arrested for

accepting and offering a bribe (46a) and was later convicted of conspiring to commit the crimes with Choe (37a). In February 2001, Ho was sentenced to 18 months imprisonment, with the sentence suspended for two years. (37a.)

5. The Korean prosecutor first obtained a warrant for Choe's arrest on March 16, 2005. (48a.) Korean authorities submitted a request to the State Department on September 28, 2005 for Choe's extradition on three separate charges, pursuant to the Extradition Treaty between the United States and Korea. (55a.) On January 3, 2006, a warrant issued for Choe's arrest, based on a complaint filed by the United States, seeking an order certifying Choe's extradition on the three charges: (1) "accepting a monetary benefit from Alsthom in exchange for lobbying government officials on their behalf"; (2) paying a bribe to close an investigation; and (3) leaving Korea "without undergoing the proper departure procedures." (19a-20a.) The United States Marshal arrested Choe at his home on February 15, 2006. (19a.)

The magistrate judge certified Choe's extradition as to the first and second charges. (44a-45a.) Upon collateral review, the court of appeals reversed certification of extradition for the first offense, and affirmed it as to the second, the alleged bribe paid to Officer Jeon. (14a.)

6. As applied to this case, Article 6 of the Extradition Treaty bars extradition "when the prosecution . . . of the offense for which extradition is requested would have been barred because of the statute of limitations of the [United States] had the same offense been committed in the [United States]." The statute of limitations in the United States for the crime of bribing a public official is five years.

18 U.S.C. § 3282. Section 3282 states that this five-year period may not be extended "[e]xcept as otherwise expressly provided by law."

7. One such express provision appears in 18 U.S.C. § 3290: "[n]o statute of limitations shall extend to any person *fleeing from justice*" (emphasis added).[1] Accordingly, the statute of limitations for the bribery charge expired in February 2001, five years after the last act allegedly occurred, in February 1996 (11a), unless the government proved Choe was continuously "fleeing from justice" from the day he traveled home to Los Angeles from Korea in December 1999, at least until January 2004, five years after the alleged bribery crime was complete.[2]

B. The Opinion of the Court of Appeals

The court of appeals said that in order to toll the limitations period on the grounds that Choe was "fleeing from justice," the government had to "show that Choe (1) 'inten[ded] to avoid arrest or prosecution' and (2) committed a 'volitional act' of concealment." (11a (alteration in original) (quoting *United States v. Wazney*, 529 F.2d 1287, 1289 (9th Cir. 1976)).) The court of appeals ruled that Choe's departure from Korea "without a passport and without informing the Korean government of his destination," established the intent to avoid arrest or

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[1] Article 6 of the Treaty is to the same effect. "The period during which a person for whom extradition is sought fled from justice does not count towards the running of the statute of limitations."

[2] The January 2004 date assumes the issuance of the Korean warrant in March 2005 tolled the limitations period, and takes into account the 14 months remaining in the five-year limitations period when Choe returned home.

prosecution element, as it showed that he knew when he left Korea "he was the subject of a criminal investigation." (12a.) The court of appeals ruled that the second element was also satisfied as, in its view, Choe had committed "'volitional act[s]' of concealment . . . when he left Korea clandestinely *and* placed himself beyond the jurisdiction of the Korean authorities." (12a-13a (emphasis added) (alteration in original).)

The court of appeals rejected Choe's contention that the government had not established he was "fleeing from justice" continuously after he departed from Korea until he was arrested more than five years later. The opinion was silent as to why being absent from a jurisdiction is not always "beyond the jurisdiction" of the prosecuting authorities, or why mere absence constitutes "fleeing from justice" under § 3290.

REASONS FOR GRANTING THE WRIT

Since 1790, when the First Congress enacted the first federal criminal statute of limitations, these statutes have ensured repose and protected the rights of an accused to a fair trial on charges timely brought. The First Congress likewise protected the interests of the government by allowing the tolling of these statutes during any period the government could prove the individual was "fleeing from justice." Notwithstanding the importance of these rights, and the corresponding weighty governmental interest, this Court has never squarely addressed the question whether the term "fleeing from justice" in 18 U.S.C. § 3290 requires intent to avoid arrest or prosecution and, if so, decided what the government must prove to establish such intent.

The circuit courts have long given contradictory answers to these critical questions, as this Court addressed them only indirectly and in dicta in its only discussion of them more than a century ago in *Streep v. United States*, 160 U.S. 128 (1895). This Court should take this opportunity to answer them directly.

I. THE CIRCUITS ARE DIVIDED OVER WHAT CONSTITUTES "FLEEING FROM JUSTICE" AND WHAT THE GOVERNMENT MUST PROVE TO ESTABLISH IT

A. The History, Text, and Purpose of the 18 U.S.C. § 3282 Statute of Limitations and the 18 U.S.C. § 3290 "Fleeing from Justice" Tolling Provision

The text of the statute of limitations for non-capital federal crimes has remained essentially the same since its enactment by the First Congress in 1790, with the only relevant change being an increase in the length of the limitations period from two to five years. *Compare* Act for the Punishment of certain Crimes against the United States, ch. IX, § 32, 1 Stat. 112, 119 (1790) (no person shall "be prosecuted, tried or punished for any offence, not capital, . . . unless the indictment or information for the same shall be found or instituted within two years from the time of committing the offence") *with* 18 U.S.C. § 3282 (no person "shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed"). The "fleeing from justice" provision in 18 U.S.C. § 3290 likewise "has remained virtually unchanged since it was enacted by the First Con-

gress." *United States v. Morgan*, 922 F.2d 1495, 1497 n.1 (10th Cir. 1991).

Taken together, the 18 U.S.C. § 3282 statute of limitations and the 18 U.S.C. § 3290 "fleeing from justice" tolling provision are "designed to balance two competing interests." *United States v. Marshall*, 856 F.2d 896, 899 (7th Cir. 1988). The statutes are intended "to allow the government sufficient time to investigate and prosecute criminal conduct," while at the same time "shielding the defendant from the burden and jeopardy of confronting distant offenses." *Id.* at 899-900. The § 3290 tolling provision ensures that the balance remains the same when a suspect "impedes" the investigation and the filing of charges by "fleeing from justice." *Id.* at 900. As the statutes recognize, in that event, the individual's "right to avoid prosecution for distant offenses is diminished," while the "government's need for additional discovery time is strengthened." *Id.*

Regardless of the calculus of interests, however, criminal statutes of limitations "provide predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced." *United States v. Marion*, 404 U.S. 307, 322 (1971). Such statutes are therefore to be "liberally interpreted in favor of repose." *Toussie v. United States*, 397 U.S. 112, 115 (1970) (citations and internal quotation marks omitted).[3]

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[3] These principles govern in extradition proceedings as well as in federal criminal cases: "The limitations provision of the treaty, no less than any found in domestic law, represents an important right of the accused." *Caplan v. Vokes*, 649 F.2d 1336, 1341 n.7 (9th Cir. 1981).

B. This Court Has Never Authoritatively Construed the "Fleeing from Justice" Tolling Provision, Nor Decided What the Government Must Prove to Apply It

This Court has not directly addressed (1) whether the government must prove an individual had the intent to avoid arrest or prosecution to be "fleeing from justice," and (2) if so, what conduct or circumstances the government must establish to meet that burden. The term "fleeing from justice" was considered in *Streep*, but a majority of the courts of appeals have long been of the view that *Streep* does not answer the questions presented here. The equally long-standing and contrary view of the government and two circuits (*see infra* Part I.C) is that *Streep* did answer them by adopting the non-intent based standard and holding that the government did not have to prove any intent, but merely absence from the prosecuting jurisdiction. *United States v. Marshall*, 856 F.2d 896, 898-99 (7th Cir. 1988) ("the government argues that *Streep* equated the nonintent-based standard of the extradition statute with that of the tolling statute"); *Donnell v. United States*, 229 F.2d 560, 561-62 (5th Cir. 1956) (noting government's position that the mere absence from jurisdiction test should apply). The courts of appeals' irreconcilable answers to those questions, and the lack of guidance from this Court, have led to the circuit split which this petition asks the Court to resolve.

C. There Is a Direct Conflict Among The Courts of Appeals

"There is a direct conflict among the Circuits" as to whether "mere absence from the place of the offense" suffices to prove "fleeing from justice," or whether the

government must also prove "flight with intent to avoid arrest or prosecution." *Jhirad v. Ferrandina*, 486 F.2d 442, 444 (2d Cir. 1973); *see also Ross v. U.S. Marshal*, 168 F.3d 1190, 1193 (10th Cir. 1999) ("The circuit courts are currently split on the issue."); *United States v. Florez*, 447 F.3d 145, 150-51 (2d Cir. 2006) (noting conflict); *Marshall*, 856 F.2d at 897-98 (same). *See generally* Kurtis A. Kemper, *What Constitutes "Fleeing from Justice" Within Meaning of 18 U.S.C.A. § 3290 Which Provides That No Statute of Limitations Shall Extend to Persons Fleeing from Justice*, 148 A.L.R. Fed. 573, 588-622 (1998) (collecting cases).

The "genesis of these divergent views is a single, turn-of-the-century Supreme Court case, *Streep v. United States*." *Marshall*, 856 F.2d at 897-98. In *Streep*, the defendant committed an offense criminal under both state and federal law. The state timely indicted him, he fled from the state, and a federal grand jury subsequently indicted him after the expiration of the federal statute of limitations. The government claimed that his flight from the state after it indicted him constituted a flight from "justice" that tolled the statute. *Id.*

This Court agreed and rejected Streep's argument that the federal statute of limitations could only be tolled if the "justice" from which the accused fled was federal:

> [I]t is quite clear that any person who takes himself out of the jurisdiction, with the intention of avoiding being brought to justice for a particular offence, can have no benefit of the [statute of] limitation[s], at least when prosecuted for that offence in a court of the United States.

Streep, 160 U.S. at 133. The Court in *Streep* did not decide what constitutes "flight" from such "justice," nor what the government had to prove to establish that the accused had "fled" within the meaning of what is today § 3290.

Two circuits – the Eighth and the District of Columbia – read *Streep* as adopting an "absence from the jurisdiction test" in determining whether a person is fleeing from justice. *In re Assarsson*, 687 F.2d 1157, 1162 (8th Cir. 1982); *McGowen v. United States*, 105 F.2d 791, 792 (D.C. Cir. 1939). Under that test, "intent to avoid arrest or prosecution is not required" to toll the limitations period; mere absence from the jurisdiction is enough. *Assarsson*, 687 F.2d at 1162; *see Florez*, 447 F.3d at 151. As noted in Part I.B *supra*, the government has taken the same position; the Ninth Circuit panel here effectively did so as well. *See infra* Part II.

The First, Second, Fourth, Fifth, Sixth, Seventh, Tenth, and Eleventh Circuits and, with the exception of the decision in this case, the Ninth Circuit, employ an intent test. *See Brouse v. United States*, 68 F.2d 294, 295 (1st Cir. 1933); *Florez*, 447 F.3d at 151 (Second Circuit); *Ferebee v. United States*, 295 F. 850, 851 (4th Cir. 1924); *Donnell*, 229 F.2d at 565 (Fifth Circuit); *United States v. Greever*, 134 F.3d 777, 781 (6th Cir. 1998); *Marshall*, 856 F.2d at 900-01 (Seventh Circuit); *Caplan v. Vokes*, 649 F.2d 1336, 1341 (9th Cir. 1981); *Ross*, 168 F.3d at 1194 (Tenth Circuit); *United States v. Fonseca-Machado*, 53 F.3d 1242, 1243-44 (11th Cir. 1995). To toll the § 3290 limitations period under the intent test in these circuits, the government must prove that the person "(1) 'inten[ded] to avoid arrest or prosecution' and (2) committed a 'volitional act' of concealment." (11a

(quoting *United States v. Wazney*, 529 F.2d 1287, 1289 (9th Cir. 1976) (stating the Ninth Circuit's test).) "Mere absence" from the jurisdiction is insufficient to prove the accused "'concealed himself with the intent to avoid arrest or prosecution'" to toll the limitations period. *Caplan*, 649 F.2d at 1341 (quoting *Wazney*, 529 F.2d at 1289).

Further, under the intent test, "the period during which a person is subject to jeopardy under federal criminal laws is lengthened by the period during which he impedes any federal criminal investigation by concealing himself with the intent to avoid arrest or prosecution." *United States v. Gonsalves*, 675 F.2d 1050, 1053 (9th Cir. 1982); *see also* Article 6 of the Extradition Treaty ("The period during which a person . . . fled from justice does not count towards the running of the statute of limitations".). Thus, the concealment and accompanying intent to avoid arrest or prosecution must continue to impede the government's investigation for the limitations period to remain tolled. *Caplan*, 649 F.2d at 1341. This rule is necessary because otherwise "for the duration of the applicable statute of limitations 'there [would be] no burden of diligence on the Government.'" *Id.*

II. THE QUESTIONS PRESENTED ARE IMPORTANT AND WARRANT THIS COURT'S REVIEW

Although the Ninth Circuit previously adopted the intent test (a test the panel in this case claimed to apply), the panel's opinion now interprets it so as to authorize the district courts to apply the "mere absence from jurisdiction" test. If the intent standard still applied, the court of appeals would not have felt compelled to split one event – Choe's leaving Korea and returning to his Los Angeles home of

nearly 40 years – into two (leaving the country and putting himself outside the territorial (but not the extraditional) reach of the Korean authorities) to support its conclusion that Choe had not just left Korea, but had "fled," and "with the intent to avoid prosecution" in Korea.

The conclusion that the court of appeals was applying the "mere absence," and not the "intent," test also flows from the court's stated rationale. The court ruled that Choe continued to be fleeing from justice because he put himself beyond the territorial jurisdiction of the prosecuting authority. But absence by its very nature means an individual is in another jurisdiction, and legal process will *always* be necessary to secure the person's presence for prosecution. If mere absence is not enough to constitute fleeing from justice, then being beyond the territorial jurisdiction of the prosecuting authority is not sufficient either; and if mere absence is sufficient, then it will toll the limitations period by itself. Individuals who leave a jurisdiction to which they have traveled, to return to their home in another jurisdiction, likewise will *always* be found to have "fled" the foreign jurisdiction merely by leaving it, and to be fleeing continuously from justice thereafter by putting themselves outside the territorial reach of the jurisdiction they left.

This Court should decide whether § 3290 can support such a reading – which the D.C. and Eighth Circuits, the government, and the Ninth Circuit in this case have concluded it can – or whether, as the majority of circuits have concluded, such a reading "would do violence to the reason and purpose of Section 3290," *Donnell*, 229 F.2d at 564, and "unduly

trammel[] the defendant's rights," *Marshall*, 856 F.2d at 900.

Only those courts of appeals which construe § 3290 as merely requiring absence from the jurisdiction hold that moving from one jurisdiction to another is enough to toll the statute of limitations, and that remaining there continues to toll it. The circuits which have adopted the intent-based view have rejected such a construction, as the Ninth Circuit has done in prior cases.[4] Given that these circuits concluded that the limitations period is not tolled when the person moves to a *new* residence or city, when the person returns to his home of nearly 40

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[4] *See, e.g.*, *Caplan*, 649 F.2d at 1341 ("The accused should not be responsible, however, for unintentional delays, such, for example, as one caused by an open move to a new residence where the accused is readily accessible to careful law enforcement officers."); *Donnell*, 229 F.2d at 564 (no suspension of statute of limitations if the accused "moved his home openly to another district, being all the while easily accessible to any officer who might have a warrant to serve"); *Ross*, 168 F.3d at 1194 n.1 (fleeing from justice means "'to leave one's home or residence or known place of abode, with intent to avoid detection or punishment'") (Tenth Circuit quoting its predecessor court, the Circuit Court of Kansas, in *United States v. O'Brian*, 27 F. Cas. 212, 213 (Cir. Ct., D. Kan. 1873) (No. 15,908)); *Marshall*, 856 F.2d at 900 ("insufficient justification . . . for disregarding the defendant's right of repose where he openly leaves the indicting jurisdiction or relocates his home while remaining accessible to discovery and prosecution"); *Brouse*, 68 F.2d at 295 ("essential characteristic of fleeing from justice is leaving one's residence, or usual place of abode or resort, or concealing one's self, with the intent to avoid punishment"); *Jhirad*, 486 F.2d at 444-45 (reasonable not to toll the statute when a person without such a purpose of escaping punishment "merely moves openly to another place of residence"); *United States v. Parrino*, 180 F.2d 613 (2d Cir. 1950) (statute of limitations lapsed where the accused returns and lives openly).

years and continues to live and work there openly, as Choe did, the same conclusion should inexorably follow.

Congress has always recognized the importance of defendants' right to a fair trial on fresh charges, and the corresponding vital governmental interest in not allowing suspects to conceal themselves and thereby impede criminal investigations. This petition affords the Court the opportunity to construe the statutory language enacted by the First Congress and balance those competing interests in a fashion that will provide authoritative guidance to the lower courts. The "mere absence from jurisdiction" test, which the Ninth Circuit followed here by reading § 3290 to require the government to prove only the "act of concealment" of leaving the jurisdiction in order to establish that the accused thereby "fled" from justice and does so continuously thereafter, upsets the careful balance struck by the First Congress.

The "mere absence" test suffers from the additional, and more pernicious, vice that it deprives the accused of the right to avoid personal jeopardy and the right to receive a fair trial not raised on stale offenses, *in perpetuity*. Judge Learned Hand long ago exposed the fallacy and unfairness of the proposition that once a person commits the "act of concealment" of leaving the jurisdiction, the person flees from justice continuously thereafter. *See United States v. Parrino*, 180 F.2d 613 (2d Cir. 1950).

Parrino fled the United States in 1934 and remained in hiding abroad at least until 1940. He later returned to America and lived openly and publicly "under his own name and without concealment" until the Federal Bureau of Investigation discovered and arrested him in 1948. *Id.* at 614. The government

argued that the three-year statute of limitations was tolled for the entire 14-year period from Parrino's flight until he took affirmative steps to notify the authorities that he had returned home.

Judge Hand rejected the government's notion "that once a suspected offender 'flees from justice,' he puts himself in the same class as those guilty of capital offences, and may be prosecuted as long as he lives." *Id.* at 616. As Judge Hand recognized, acceptance of that proposition would "frustrate the whole purpose which lies behind any statute of limitations," as it would mean that "once such a suspect runs away, he hangs his crime about his neck forever, however trivial it may be." *Id.* As a result, "no matter how completely time may have destroyed his defense, he must live forever at the mercy of any official who may choose to revive the old charge." *Id.*

CONCLUSION

If "fleeing from justice" requires the government to prove intent, the petition presents "a paradigm case for invocation of the statute of limitations," *United States v. DiSantillo*, 615 F.2d 128, 136 (3d Cir. 1980) and a paradigm case for tolling the statute if it does not. This Court accordingly should grant review to determine the "outer limits" of the "flight and concealment necessary to categorize a person as a fugitive from justice" and of "when a person ceases to be a fugitive." *Morgan*, 922 F.2d at 1498 n.2.

Respectfully submitted,

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December 15, 2008

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 06-56634

MAN-SEOK CHOE,
Petitioner-Appellant,

v.

ADAM N. TORRES, U.S. Marshal,
in his official capacity,
Respondent-Appellee.

August 7, 2007, Argued and Submitted,
Pasadena, California
April 29, 2008, Filed

Appeal from the United States District Court for the Central District of California. D.C. No. CV-06-06745-RGK. R. Gary Klausner, District Judge, Presiding.

COUNSEL: William J. Genego, Nasatir, Hirsch, Podberesky & Genego, Santa Monica, California, for the petitioner-appellant.

Daniel J. O'Brien, Assistant U.S. Attorney; George S. Cardona, Acting U.S. Attorney; Thomas P. O'Brien, Assistant U.S. Attorney; Daniel Scott Goodman, Assistant U.S. Attorney, Los Angeles, California, for the respondent-appellee.

JUDGES: Before: Alex Kozinski, Chief Judge, Johnnie B. Rawlinson, Circuit Judge, and Harold Baer, Jr.,* Senior District Judge.

OPINION BY: Alex Kozinski

OPINION

KOZINSKI, Chief Judge:

We consider whether the district court erred in denying Man-Seok Choe's habeas corpus petition challenging certification of his extradition to the Republic of Korea.

Facts

Choe is a Korean citizen and a resident of Los Angeles. In the 1990s, he traveled frequently to Korea on business, where he was acquainted with important political figures. During one of his visits to Korea, Choe learned that he was under criminal investigation. Choe thereupon left Korea in secret and returned to Los Angeles. After Korea requested Choe's extradition, the United States took him into custody. Pursuant to 18 U.S.C. § 3181 *et seq.*, Magistrate Judge Marc L. Goldman determined that Choe was subject to surrender under the terms of the Extradition Treaty Between the Government of the United States of America and the Government of the Republic of Korea, June 9, 1998 ("Treaty"), and certified two crimes for extradition.[1] Choe then petitioned the district court for a writ of habeas corpus. The

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* The Honorable Harold Baer, Jr., Senior U.S. District Judge for the Southern District of New York, sitting by designation.

[1] Courts may only certify crimes for extradition. 18 U.S.C. § 3184. The ultimate decision whether to extradite is left to the Secretary of State. *Id.*; *Blaxland v. Commonwealth Dir. of Pub. Prosecutions*, 323 F.3d 1198, 1208 (9th Cir. 2003).

district court summarily denied his petition, relying on the magistrate judge's determination that Choe is extraditable. Choe appeals.[2]

Analysis

Because the district court denied Choe's petition in a minute order, we review the magistrate judge's memorandum and order certifying the crimes for extradition. *Barapind v. Enomoto*, 400 F.3d 744, 748 (9th Cir. 2005) (en banc) (per curiam).

1. Acceptance of Bribe Through Good Offices

Article 2 of the Treaty provides that an "offense shall be an extraditable offense if . . . it is punishable under the laws" of both nations. Treaty art. 2(1). This is known as the "dual criminality" requirement. *Clarey v. Gregg*, 138 F.3d 764, 765 (9th Cir. 1998). In determining whether Korea has satisfied the dual criminality requirement, we consider "the totality of the conduct alleged." Treaty art. 2(3); *see also Clarey*, 138 F.3d at 766 ("The primary focus of dual criminality has always been on the conduct charged; the elements of the analogous offenses need not be identical."); *Emami v. U.S. Dist. Court*, 834 F.2d 1444, 1450 (9th Cir. 1987) ("[A]ll the principle of dual criminality requires is that the particular acts alleged constitute a crime in both jurisdictions."); *In re Russell*, 789 F.2d 801, 803 (9th Cir. 1986) ("[T]o satisfy the 'dual criminality' requirement, . . . [i]t is enough that the conduct involved is criminal in both countries."). We review de novo the determination that an offense

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[2] While the magistrate judge's determination that Choe is extraditable is not subject to direct appeal, it is subject to collateral review by way of habeas corpus. *See Oen Yin-Choy v. Robinson*, 858 F.2d 1400, 1402 (9th Cir. 1988).

is extraditable. *United States v. Van Cauwenberghe*, 827 F.2d 424, 428 (9th Cir. 1987).

The extradition papers allege that Choe improperly influenced the Korean government on behalf of Alsthom Co. Alsthom submitted a bid to supply the Korean government with high speed rail cars for a national rapid transit railway system. The papers allege that Choe promised Myung Soo Hwang, who was then the secretary general of the ruling party and a member of the National Assembly, a "sufficient reward" if Hwang exerted his influence on Alsthom's behalf and the bid were successful. Alsthom won the contract and promptly paid Choe over $ 11 million; Choe, in turn, paid Hwang approximately $ 400,000.

It's clear that this alleged conduct—promising and then paying a bribe to a public official in exchange for an official act—is a crime under U.S. law. Choe's conduct, if committed in the United States, would be punishable under several statutes including: 18 U.S.C. § 201(b), which makes it illegal to bribe any public official in order to influence his official actions; 18 U.S.C. § 666(a)(2), which makes it a crime to bribe recipients of federal funds; and 18 U.S.C. §§ 1343, *1346*, which allow for prosecution of individuals who deprive citizens of the honest services of a public official. *See United States v. Blumeyer*, 114 F.3d 758, 765 (8th Cir. 1997). In short, the "totality of the conduct alleged," Treaty art. 2(3), is "punishable under the laws" of both nations, *id.* art. 2(1).

Choe nevertheless contends that the offense isn't extraditable because Article 2 of the Treaty further requires that the Korean and U.S. laws be "substan-

tially analogous."[3] Choe argues that the Korean law under which he has been charged—Acceptance of Bribe Through Good Offices[4]—isn't "substantially analogous" to any U.S. law. The Korean statute provides: "Any person who receives, demands or promises any money or interest in connection with a mediation of matters belonging to the duties of the public official, shall be punished . . . ." Choe points out that this language seems to criminalize conduct that we would consider mere lobbying. According to Choe, the vague phrase "in connection with a mediation of matters belonging to the duties of the public official" is broad enough to cover the activities of a lobbyist who helps provide access to public officials in a legitimate attempt to influence their official actions.

But Choe misconceives the meaning of the term "substantially analogous." Just three months before the Treaty was signed, we adopted the following definition: "[W]hen the laws of both the requesting and the requested party appear to be directed to the same basic evil, the statutes are substantially analogous." *Clarey*, 138 F.3d at 766 (internal quotation marks and citation omitted). Korea's statute is "directed to the same basic evil" as our bribery laws, namely, the corruption of public officials. The fact

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[3] Article 2 provides:

> [A]n offense shall be an extraditable offense . . . whether or not the constituent elements of the offense differ under the laws in [Korea and the United States], provided that the offenses under the laws of both States are substantially analogous.

Treaty art. 2(3).

[4] This is the title of the Korean statute as translated in the extradition papers.

that the Korean law is broader than ours, and thus punishes conduct that would not be unlawful here, is of no consequence, so long as the particular conduct Choe is charged with is prohibited in both countries. *Id.*

Choe further contends that the United States[5] hasn't established probable cause that he committed the acts with which he's charged. The Treaty requires "such information as would provide reasonable grounds to believe that the person sought has committed the offense for which extradition is requested." Treaty art. 8(3)(c). The magistrate judge found that the United States satisfied this requirement, and we must uphold that finding if "competent evidence" supports it. *Zanazanian v. United States*, 729 F.2d 624, 626 (9th Cir. 1984).

The magistrate judge's memorandum and order discusses the extensive evidence that Alsthom paid Choe $ 11 million for his services, but doesn't mention any evidence that Choe promised Hwang a reward, that Choe gave Hwang anything, or even that Choe met with Hwang. Though the extradition papers accuse Choe of doing these things, accusations are not evidence. *See In re Sauvage*, 819 F. Supp. 896, 902-03 (S.D. Cal. 1993). This failure is particularly significant because the Korean prosecutor who prepared the extradition papers had before him the complete statement of Ki Choon Ho, Choe's alleged accomplice in the crime, yet there's no indication in the papers that Ho implicated Choe in bribing Hwang.

To be sure, the magistrate judge had evidence that Choe may have committed *some* violation of the Ac-

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[5] Pursuant to Article 18 of the Treaty, the United States represented Korea's interests before the magistrate judge.

ceptance of Bribe Through Good Offices statute. That statute prohibited Choe from "receiv[ing]" Alsthom's money "in connection with a mediation of matters belonging to the duties of the public official," so it's likely that Choe violated the Korean law the moment he allegedly took Alsthom's money, whether or not he then paid any of it over to Hwang. But the Treaty isn't satisfied by proof that Choe probably committed *some* violation of the statute; it requires probable cause that Choe committed the particular acts of which he's accused, namely, bribing Hwang. *See* Treaty art. 8(3)(c); *see also* 18 U.S.C. § 3184 (extradition requires "evidence sufficient to sustain *the* charge" leveled against the fugitive) (emphasis added); *Quinn v. Robinson*, 783 F.2d 776, 787 (9th Cir. 1986) (section 3184 requires probable cause to believe the accused committed the particular "charged offense").

Because there's no competent evidence to support the magistrate judge's finding of probable cause that Choe committed the particular acts "for which extradition is requested," Treaty art. 8(3)(c), we reverse the district court's denial of habeas corpus as to this offense.[6]

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[6] As we see below, Korea also has a conventional bribery statute. *See* p.4604 *infra*. The United States urges us to certify Choe's alleged bribe to Hwang as a violation of that statute. But changing the legal theory can't cure the lack of evidence that Choe bribed Hwang. In any event, we don't have the power to certify new offenses for extradition. If the government believes it can extradite Choe on the charge that he violated Korea's conventional bribery statute by bribing Hwang, it must make that case before an extradition court, which has the power to determine in the first instance whether Korea's extradition papers support such a charge and whether the evidence is "sufficient to sustain" it. 18 U.S.C. § 3184; *see United States v. Doherty*, 786 F.2d 491, 501-03 (2d Cir. 1986).

2. Stowaway Control Act

Choe's petition for a writ of habeas corpus seeks relief from the magistrate judge's certification for Choe's violation of the Stowaway Control Act and, curiously, the parties discuss this issue at length in their briefs. But the magistrate judge did not certify this offense for extradition, so Korea can't prosecute Choe for it, *see* Treaty art. 15(1)(a), p.4608 *infra*, and the United States can't appeal the magistrate judge's adverse determination, *see United States v. Doherty*, 786 F.2d 491, 501-03 (2d Cir. 1986). The issue is thus not properly before us and we do not consider it.

3. Offering Bribe

After Korean authorities launched an investigation into Choe's lobbying activities, Choe allegedly bribed a Korean police officer, Yoon Ki Jeon, to exert his influence to close the investigation. Such conduct, if proven, would violate a Korean statute titled Offering Bribe. Choe concedes that this is an extraditable offense but claims that the evidence does not support probable cause. As discussed above, *see* pp.4602-03 *supra*, the Treaty requires "such information as would provide reasonable grounds to believe that the person sought has committed the offense for which extradition is requested." Treaty art. 8(3)(c). Here again, the magistrate judge found that the United States, representing Korea's interests, satisfied this burden; we must uphold the magistrate judge's finding if "competent evidence" supports it. *Zanazanian*, 729 F.2d at 626.

The magistrate judge's memorandum and order contains a detailed account of the evidence supporting probable cause to believe Choe bribed Officer Jeon in an effort to stop the police investigation,

including the Korean prosecutor's summary of testimony from Choe's accomplice, Ki Choon Ho, who implicates Choe in a scheme to bribe Officer Jeon. Ho, who allegedly aided Choe in his lobbying activities, provides names, dates, an explanation of how she became aware Korean authorities were investigating their lobbying activities, the financial breakdown of the bribe and how it was apportioned, how she met Officer Jeon and the way in which Officer Jeon was paid.

Ho was convicted in Korea and sentenced to 18 months in prison for her role in bribing Officer Jeon. The magistrate judge also relied on the Korean prosecutor's summary of testimony from another witness, Sang In Kim, who indicated that he introduced Ho to Officer Jeon, that he was present when Ho offered Officer Jeon a bribe and that he delivered money to Officer Jeon on Ho's behalf. The magistrate judge also considered other evidence such as a bank statement documenting the bribe and the prosecutor's summary of testimony from another Korean police officer, but it is unnecessary to discuss these in any detail as there is more than enough evidence to support the magistrate judge's finding.

Choe contends this evidence cannot support a finding of probable cause because the Korean prosecutor's summaries aren't reliable. But if the evidence submitted in the extradition papers is certified and authenticated in accordance with the admissibility requirements of Article 9 of the Treaty[7] and 18 U.S.C.

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[7] Article 9 of the Treaty provides th. t documents are admissible when "they are certified by the principal diplomatic or consular officer of the Requested State resident in the Requesting State; or [when] they are [**13] certified or authenticated in

§ 3190[8]—which is not disputed here—the magistrate judge is authorized to consider it. *See, e.g., Collins v. Loisel*, 259 U.S. 309, 317, 42 S. Ct. 469, 66 L. Ed. 956 (1922) ("[U]nsworn statements of absent witnesses may be acted upon by the committing magistrate."); *Zanazanian*, 729 F.2d at 627 (police reports summarizing witnesses' statements are competent evidence); *Emami*, 834 F.2d at 1450-52 (upholding extradition based on affidavit containing summaries of witnesses' statements).

Choe also attacks Ho's credibility. He points out that Ho had every reason to shift blame to him to reduce her own culpability, and that her statements aren't supported by any other witness. But the Treaty merely requires "such information as would provide reasonable grounds to believe" that Choe committed the crime. Treaty art. 8(3)(c). Here, Ho's lack of credibility is merely a weakness in Korea's case; it does not "completely obliterate[ ]" the evidence of probable cause. *Barapind*, 400 F.3d at 749. Choe further contends that the magistrate judge erred by refusing to allow him to conduct discovery on Ho's credibility, but this wasn't error because any such evidence

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any other manner accepted by the law of the Requested State." Treaty art. 9(a)-(b).

[8] 18 U.S.C. § 3190 provides that documents

> offered in evidence upon the hearing of any extradition case shall be received and admitted as evidence on such hearing for all the purposes of such hearing if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that the same, so offered, are authenticated in the manner required.

wouldn't be admissible. *Id.* ("[E]vidence that merely controverts the existence of probable cause, or raises a defense, is not admissible.").

4. Statute of Limitations

Article 6 of the Treaty provides that extradition for a crime may be denied if punishment for the crime would be barred by the statute of limitations of the United States had the crime been committed here.[9] In the United States, the statute of limitations for the crime of bribing a public official—the only crime which can properly be certified for extradition, *see* pp.4604-07 *supra*—is five years. 18 U.S.C. § 3282. As the final bribe to Officer Jeon was paid in February 1996, the statute of limitations would have lapsed in February 2001. However, under U.S. law, the statute of limitations is tolled if the accused flees from justice. 18 U.S.C. § 3290. To toll the statute, the United States must show that Choe (1) "inten[ded] to avoid arrest or prosecution" and (2) committed a "volitional act" of concealment. *See United States v. Wazney*, 529 F.2d 1287, 1289 (9th Cir. 1976). We review the magistrate judge's factual findings for clear error, but the "ultimate 'fleeing from justice'

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[9] At oral argument, the United States argued for the first time that we do not have the authority to deny extradition on the basis of the Treaty's statute of limitations provision because this provision is couched in discretionary terms. *See* Treaty art. 6 ("Extradition *may* be denied . . . when . . . punishment of the offense . . . would have been barred because of the statute of limitations of the Requested State had the same offense been committed in the Requested State.") (emphasis added). According to the United States, only the Executive Branch can take action on the basis of discretionary Treaty language. Because this argument was raised for the first time on appeal, it is waived. *Cf. Broad v. Sealaska Corp.*, 85 F.3d 422, 430 (9th Cir. 1996).

question" we review "de novo because legal concepts that require us to exercise judgment dominate the mix of fact and law." *United States v. Fowlie*, 24 F.3d 1070, 1072 (9th Cir. 1994).

In October 1999, well within the statute of limitations period, Choe booked a flight from Korea. He was stopped at the airport and prevented from boarding. His passport was confiscated and he was questioned by Korean authorities regarding his lobbying activities and alleged bribe to Officer Jeon. He was interrogated again later that month. Some two months later, Choe left Korea without a passport and without informing the Korean government of his destination. *Cf. Caplan v. Vokes*, 649 F.2d 1336, 1341 (9th Cir. 1981) (defendant did not flee from justice because he remained in the country until the initial investigation was complete and he subsequently provided the authorities with the address of his new foreign residence). The magistrate judge did not clearly err in finding, based on this evidence, that Choe was aware that he was the subject of a criminal investigation at the time he left Korea and, consequently, that he did so in order to avoid being taken into custody.[10]

With respect to the second element of fleeing from justice, the accused commits a "volitional act" of concealment when he takes "significant affirmative steps

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[10] We reject Choe's argument that he could not have had the intent to avoid prosecution because no charges were pending when he fled Korea. It is well settled that one can flee from justice for purposes of tolling the statute of limitations even if no charges are pending at the time of flight. *United States v. Ballesteros-Cordova*, 586 F.2d 1321, 1323 (9th Cir. 1978) (per curiam). Here, Choe knew he was under investigation for serious crimes when he disappeared.

to avoid prosecution." *Fowlie*, 24 F.3d at 1072. Here, Choe's secret flight from Korea was a "significant affirmative step[ ] to avoid prosecution." *Id.*

Choe argues that he did not conceal himself because he lived openly in Los Angeles, operated his business in his own name and applied for U.S. citizenship. But the fact that he could have taken additional steps to conceal his whereabouts does not mean that Choe was not a fugitive from justice. He may have felt safe enough being thousands of miles away from the government that was seeking to prosecute him. In *Fowlie*, for example, we held that defendant concealed himself in Mexico from U.S. authorities even though there was "no evidence that he went out of his way to conceal his presence." *Id.* Choe's "volitional act[s]" of concealment occurred when he left Korea clandestinely and placed himself beyond the jurisdiction of the Korean authorities.

Choe also argues that the statute of limitations should not be tolled because the Korean authorities were aware that Choe applied for citizenship in the United States in 2001, yet did not request his extradition until 2005. According to Choe, this demonstrates "inaction or lack of diligence on the part of the [Korean] government." To the extent there was a delay, this is a matter left for the Secretary of State's consideration. *See Kamrin v. United States,* 725 F.2d 1225, 1227 (9th Cir. 1984) ("The delay may not . . . serve as a defense to judicial extradition proceedings.").

5. Rule of Specialty

Article 15 of the Treaty provides that Choe cannot be "detained, tried or punished" in Korea for any offense unless we "grant[ ]" extradition for that par-

ticular offense. Treaty art. 15(1)(a). As only one offense—allegedly bribing Officer Jeon in violation of the Offering Bribe statute—satisfies all the Treaty requirements, this is the only offense for which certification is proper.

* * *

We AFFIRM the district court's order denying habeas corpus as to the charge that Choe bribed Officer Jeon, but REVERSE the district court's denial of habeas corpus as to the charge that Choe bribed Hwang. On remand, the district court shall enter an order striking the magistrate judge's certification for that offense as a proper basis for extradition, but shall otherwise continue to deny the petition.

AFFIRMED in part, REVERSED in part and REMANDED.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed SEP 16 2008]

No. 06-56634
D.C. No. CV-06-06745-RGK

MAN-SEOK CHOE,
Petitioner - Appellant,

v.

ADAM N. TORRES, U.S. Marshall,
in his official capacity,
Respondent - Appellee.

ORDER

Before: KOZINSKI, Chief Judge, RAWLINSON, Circuit Judge and BAER,* District Judge.

The petition for rehearing and rehearing en banc is denied. *See* Fed. R. App. P. 35; Fed. R. App. P. 40.

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* The Honorable Harold Baer, Jr., Senior U.S. District Judge for the Southern District of New York, sitting by designation.

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed SEP 29 2008]

No. 06-56634
D.C. No. CV-06-06745-RGK

MAN-SEOK CHOE,
Petitioner - Appellant,

v.

ADAM N. TORRES, U.S. Marshall,
in his official capacity,
Respondent - Appellee.

ORDER

KOZINSKI, Chief Judge:

Appellant's motion for stay of mandate is granted. Fed. R. App. P. 41(d)(2). The mandate is stayed until December 15, 2008.

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 06-06745-REK Date NOV 06 2006

Title *MAN-SEOK CHOE v. ADAM N. TORRES*, in his official capacity as United States Marshal

Present: The Honorable R. GARY KLAUSNER, U.S. DISTRICT JUDGE

Sharon L. Williams	Not Reported	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: (IN CHAMBERS) PETITION FOR WRIT OF HABEAS CORPUS CHALLENGING ORDER CERTIFYING EXTRADITION

Man-Seok Choe ("Choe") challenges the order issued October 10, 2006, by the Honorable Marc L. Goldman, U.S. Magistrate Judge, certifying the Republic of Korea's request for his extradition and ordering him committed to custody pursuant to 18 U.S.C. § 3184.

This Court has reviewed Magistrate Judge Goldman's ruling, the memorandum of points and authorities filed in support of Choe's Petition, as well as the underlying record. After review of these documents and upon consideration of the relevant law and facts, the Court finds that Magistrate Judge

Goldman's ruling was proper. Choe's Petition is hereby denied.

IT IS SO ORDERED.

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APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

[Filed OCT 10 2006]

Case No. CV 06-01544-RGK (MLG)

IN THE MATTER OF THE EXTRADITION OF MAN SEOK CHOE, A fugitive from the Republic of Korea.

MEMORANDUM AND ORDER GRANTING REQUEST FOR EXTRADITION AND COMMITTING FUGITIVE TO CUSTODY

I. Background

Before the Court is a request for extradition brought by the Republic of Korea ("Korea"), the requesting state, against Man Seok Choe ("Choe"). Pursuant to an extradition treaty between the United States and Korea, the United States acts on behalf of Korea in this matter. *See* Extradition Treaty Between The Government of the United States of America and the Government of the Republic of Korea, Dec. 10, 1999, art. 18, 18 U.S.C. § 3181 ("Extradition Treaty" or "Treaty"). On January 3, 2006, a warrant was issued pursuant to 18 USC § 3184 for the arrest of Man Seok Choe based on a complaint filed by the United States, alleging that Choe was the subject of an extradition request made by Korea. Case No. 06-M-0001. Pursuant to the warrant, on February 15, 2006, United States Marshals arrested Choe in this judicial district. Choe, a Korean citizen and U.S. resident alien since 1970, is accused by Korea of having com-

mitted the following crimes in Korea: (1) Acceptance of a Bribe Through Good Office, in violation of article 3 of the Act on Aggravated Punishment, etc of Specific Crimes; (2) Offering a Bribe to a Public Official, in violation of paragraph I, article 133 of the criminal code; and (3) Stowing Away, in violation of paragraph I, article 3. No formal charges have been filed by Korea.[1]

On February 16, 2006, Choe was brought before United States Magistrate Judge Oswald Parada for an initial appearance. Choe was ordered detained without bond. On March 13, 2006, Korea's formal extradition request for Choe's surrender was filed by the United States and assigned to United States District Judge R. Gary Klausner and this United States Magistrate Judge. On April 3, 2006, a supplemental warrant of arrest was submitted by Korea and filed by the United States, extending the validity of the previous warrant to February 20, 2007.

On April 4, 2006, Choe filed a motion for review of the order detaining him without bail entered by Judge Parada. This Court denied that motion on April 10, 2006, and ordered Choe detained pending further proceedings. Choe filed an application for review and reconsideration of the this Court's order

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[1] In Korea's formal extradition papers, Kwang Soo Oh, Prosecutor of the Central Investigation Department, explains that "it is [the] normal practice of investigation and prosecution in Korea for prosecutors not to indict a suspect who is on the run," and that an indictment will follow completion of the extradition process. (Formal Extradition Papers at 71).

The Treaty between the US and Korea allows requests for extradition to be supported by either a copy of the warrant or order of arrest, or a copy of the charging document. Treaty, art. 8(3).

by Judge Klausner, and on May 17, 2006, Judge Klausner ordered Choe detained without bail. Choe appealed the detention order to the United States Court of Appeals for the Ninth Circuit, which affirmed the District Court's order on June 16, 2006. Case No. 06-55738.

Choe filed an Opposition ("Opposition") to the request for extradition and the United States filed a Reply ("Govt.'s Reply"). An extradition hearing was held before this Court on August 3, 2006. Assistant United States Attorney Daniel O' Brien appeared on Korea's behalf, and William J. Genego appeared on behalf of Choe. After considering the parties respective papers, evidence, and oral arguments, the matter was taken under submission. For the reasons discussed below, the Court issues this Memorandum and Order granting Korea's request for Choe's extradition.

II. The Crimes Alleged[2]

A. Acceptance of a Bribe Through Good Office, in Violation of Article 3 of the Act on Aggravated Punishment, etc of Specific Crimes.

On May 8, 1989, the Korean government announced plans to construct a national rapid transit railway system. (Formal Extradition Papers "FEP" at 71). The Korean government solicited bids for the supply of high-speed trains, and three companies were in fierce competition for the contract. (Id.). One of those companies was Alsthom Co. of France ("Alsthom"). (Id.).

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[2] The facts are taken from the allegations made by Kwang Soo Oh, Prosecutor of the Central Investigation Department at the Supreme Prosecutor's Office in Korea, in support of Korea's formal request for the extradition of Choe.

In December 1992, Alsthom CEO Jean Cariou asked Ki Choon Ho (who was then an acquaintance of, but who would later marry Cariou) to assist them in locating someone who could lobby the Korean government on their behalf, and thereby help to ensure that Alsthom would be awarded the rail car contract. (FEP at 75). In February 1993, a fortuneteller with whom Ho had been acquainted introduced her to Choe, who was widely known among political and administrative officials. (Id.).

In early April of 1993, Ho and Choe met with the Chairman of Alsthom at the business room of the Westin Chosun Hotel in Seoul. The Chairman of Alsthom asked Ho and Choe if they would lobby government officials to select Alsthom for the high-speed rail contract. (FEP at 76). Alsthom promised to pay Ho and Choe 1 percent of the total contract price if Alsthom was awarded the contract. (Id.). Choe and Ho accepted Alsthom's offer, and agreed to divide the payment 65 percent / 35 percent, respectively. Later that same month, Choe approached Myung Soo Hwang, Secretary General of the ruling party in Korea and a member of the National Assembly, and asked him to exert his influence on behalf of Alsthom. (FEP at 76). Choe allegedly promised Hwang significant compensation if Alsthom was successful in its bid. (Id.).

According to the prosecutor, as a result of Choe's lobbying Alsthom was selected as supplier for Korea's high-speed rail cars on June 14, 1994. (FEP at 76). Pursuant to their agreement, on November 28, 1994 and May 16, 1995, Alsthom transferred approximately $11,292,803 to an account belonging to Choe in Hong Kong. (Id). On December 10, 1994 and May 19, 1995, Choe remitted a total of $3,952,200 to Ho. (Id.). The prosecutor further alleges that Choe paid

Hwang 400 million won in exchange for Hwang exerting his political influence on behalf of Alsthom. (FEP at 73, 95-96).

Under Korean law, Choe's act of accepting a monetary benefit from Alsthom in exchange for lobbying government officials on their behalf, constitutes the crime of acceptance of a bribe through good offices, in violation of Article 3. (FEP at 77, 86).

B. Offering a Bribe to a Public Official, in Violation of Paragraph I, Article 133 of the Criminal Code

On June 8, 1995, Hong Kong police became suspicious after discovering the large amount of money deposited into Choe's Hong Kong account by Alsthom. (FEP at 72, 77). Suspecting that the money might be connected with drug trafficking, they alerted Korean officials to Choe's account activity. (Id.). By November 1995, the Koran police had launched an investigation into the transfer of funds. (FEP at 77). Shortly thereafter, Ho was questioned by the police. (FEP at 78).

It is alleged that Ho and Choe conspired to bribe Yoon Ki Jeon, Chief of the Kimpo Airport Police Station, to close the investigation. (FEP at 78). According to the prosecutor, Ho and Choe further agreed that Ho would provide the money for the bribe up front, and Choe would bear half of the expense later. (FEP at 78).

In early December 1995, Sang In Kim introduced Ho to Officer Jeon at his office. (FEP at 78). At that meeting, Ho asked Officer Jeon to exert his influence to close the case without further inquiry. (Id.). Over the next three months, Ho paid Jeon approximately

$80,000. (Id.). On March 19, 1996, the investigation was closed without further investigation. (FEP at 84).

Korea claims that Choe's alleged act of conspiring with Ho to bribe a police officer to close the investigation launched against them violates paragraph I, article 133 of the criminal code, which prohibits offering a bribe to a public officer in connection with his official duties. (FEP at 78, 87).

C. Violation of the Stowaway Control Act, Paragraph 1, Article 3.

In April 1998, the prosecutor for the Central Investigation Department at the Supreme Prosecutor's Office reopened the investigation of the 1994-95 transfer of funds from Alsthom to Choe, and the transfer of funds from Choe to Ho. (FEP at 72).

On September 28, 1999, a departure prohibition, preventing Choe from leaving Korea, was issued against Choe at the request of the investigating prosecutor. (FEP at 78). On October 2, 1999, Choe, who was unaware of the departure prohibition, was stopped by officials while trying to fly from Korea to Los Angeles, California. (FEP at 79, 85). As a result, Choe's passport was confiscated. (Id.).

Sometime in October 1999, both Choe and Ho were interrogated by an investigating prosecutor. (FEP at 74). On October 29, 1999, Choe appeared at the Central Investigation Department in order to make a statement. (FEP at 79). The departure prohibition had expired, but Choe's passport was never returned. However, sometime in December 1999, Choe left Korea. (Id.). He eventually made his way back to the United States.

Under Korean law, Choe's act of leaving Korea, when his passport had been confiscated and without

undergoing the proper departure procedures, violates paragraph 1, article 3, of the Stowaway Control Act.

II. Discussion

A. Legal Standard

Extradition from the United States is governed by 18 U.S.C. § 3184, which confers jurisdiction on "any justice or judge of the United States" or any authorized magistrate judge to conduct an extradition hearing under the relevant extradition treaty between the United States and the requesting nation.[5] The pur-

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[5] 18 U.S.C. § 3184 provides that:

> Whenever there is a treaty or convention for extradition between the United States and any foreign government, or in cases arising under section 3181(b), any justice or judge of the United States, or any magistrate judge authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any state, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, or provided for under section 3181(b), issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate judge, to the end that the evidence of criminality may be heard and considered. Such complaint may be filed before and such a warrant may be issues by a judge or magistrate judge of the United States District Court for the District of Columbia if the whereabouts within the United States of the person charged are not known or, if there is reason to believe the person will shortly enter the United States. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, or under section 3181(b), he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such

pose of the extradition hearing is to determine whether a person arrested pursuant to a complaint in the United States on behalf of a foreign government is subject to surrender to the requesting country under the terms of the pertinent treaty and relevant law. *See* 18 U.S.C. § 3184. In order to surrender the person to the requesting country, the Court must determine that each of the following requirements have been met: (1) the extradition magistrate has jurisdiction to conduct the extradition proceedings; (2) the extradition magistrate has jurisdiction over the fugitive; (3) an extradition treaty is in full force and effect; (4) the crime is extraditable (the dual criminality requirement); (5) there is probable cause to believe that the individual appearing before the magistrate judge has committed the crimes alleged by the requesting nation (the probable cause requirement); and (6) there are no applicable treaty provisions which bar the extradition for any of the charged offenses. *See Barapind v. Reno*, 225 F.3d 1100, 1105 (9th Cir. 2000); *Cornejo-Barreto v. Seifert*, 218 F.3d 1004, 1009-10 (9th Cir. 2000); *Quinn v. Robinson*, 783 F.2d 776, 783, 790 (9th Cir. 1986); *Zanazanian v. U.S.*, 729 F.2d 624, 626 (9th Cir. 1984).

If these requirements are met, the extradition magistrate must certify the individual as extraditable to the Secretary of State and issue a warrant of commitment. *Blaxland v. Commonwealth Dir. of Pub. Prosecutions*, 323 F.3d 1198, 1208 (9th Cir. 2003). Once such a certification has been made, "it is the Secre-

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foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.

tary of State, representing the executive branch, who determines whether to surrender the fugitive." *Blaxland,* 323 F.3d at 1208; 18 U.S.C. § 3184. Extradition is a matter of foreign policy entirely within the discretion of the executive branch, and "the executive branch's ultimate decision on extradition may be based on a variety of grounds, ranging from individual circumstances, to foreign policy concerns, to political exigencies." *Blaxland,* 323 F.3d at 1208. Thus, the authority of the extradition magistrate is limited to the judicial determination required by section 3184.

United States citizenship does not bar extradition by the United States. *See* Treaty, art. 3(1) ("Neither [c]ontracting [s]tate shall be bound to extradite its own nationals, but the [r]equested [s]tate shall have the power to extradite such person if, in its discretion, it be deemed proper to do so"); *Charlton v. Kelly,* 229 U.S. 447, 467-8 (1913); *Quinn,* 783 F.2d at 782.

B. The Judicial Officer is Authorized to Conduct the Extradition Proceedings

Pursuant to section 3184 and General Order No. 01-13,[4] this Court has jurisdiction to preside over the extradition of Choe. This issue was not challenged by Choe.

C. The Court Has Jurisdiction Over the Fugitive

Pursuant to section 3184, this Court has jurisdiction over Choe, who is "found within [this] judicial district," because he was arrested, and is presently

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[4] United States District Court for the Central District of California General Order No. 01-13 authorizes this Court's magistrate judges to preside over "[e]xtradition proceedings pursuant to 18 U.S.C. 3181 et seq."

detained, in the Central District of California. This issue was not challenged by Choe.

D. There is an Applicable Treaty in Full Force and Effect

The parties do not dispute, and this Court expressly finds, an extradition treaty between the United States and Korea is in full force and effect. *See* 18 U.S.C. § 3181 (Historical and Statutory Notes). The Treaty applies to offenses committed before and after the date it entered into force. Treaty, art. 20.

E. Extraditable Offense - The Dual Criminality Requirement

"[U]nder the doctrine of 'dual criminality,' an accused person can be extradited only if the conduct complained of is considered criminal by the jurisprudence or under the laws of both the requesting and requested nations." *Quinn,* 783 F.2d at 786-87. The dual criminality principle is explicitly incorporated into Article 2 of the Extradition Treaty, which provides that: "[an offense shall be an extraditable offense if, at the time of the request, it is punishable under the laws in both the Contracting States by deprivation of liberty for a period of more than one year, or by a more severe penalty." Treaty, art. 2(1).

The principle of dual criminality does not require that the name by which the crimes are described in the requesting and the requested states be the same, nor does it require that the scope of criminal liability be coextensive. *Collins v. Loisel,* 259 U.S. 309, 312 (1922). "It is enough if the particular act charged is criminal in both jurisdictions." *Id.* at 312. In determining whether the act charged is criminal in both jurisdictions, the "totality of the conduct alleged" must be taken into account. Treaty, art. 2(3). More-

over, an offense is extraditable whether or not the laws in the contracting states "place the offense within the same category of offenses or describe the offense by the same terminology," and whether or not the constituent elements differ under the laws of the contracting states, provided "that the offenses under the laws of both states are substantially analogous." Treaty, art. 2(3)(b) (c); *see also U.S. v. Khan,* 993 F.2d 1368, 1372 (9th Cir. 1993) ("Many cases have held that dual criminality is satisfied even though the names of the crimes and the required elements were different in the two countries"); *Emami v. U.S. D.*, 834 F.2d 1444, 1450 (9th Cir. 1987) (required elements may be different in the requesting and requested nations as long as "substantive conduct each statute punishes is functionally identical"); *Cucuzzella v. Keliikoa,* 638 F.2d 105, 108 (9th Cir. 1981) ("The crimes need not be identical").

1. Acceptance of Bribe Through Good Offices

Choe contends that the act constituting the first offense for which extradition is requested does not satisfy the dual criminality requirement. (Opposition at 16). Specifically, Choe asserts that he cannot be extradited for the first alleged crime because his receipt of money from Alsthom is not criminal under U.S. law, and because there is no offense under U.S. law which is substantially analogous to acceptance of bribe through good offices.

The Korean law provides as follows: "Any person who receives, demands or promises any money or interest in connection with a mediation of matters belonging to the duties of the public official, shall be punished by imprisonment for not more than five years or a fine not exceeding ten million won." (FEP at 86). In its formal papers, Korea explains that the

crime is constituted when a civilian performs "good offices" with respect to affairs within the scope of a public officer's duty, and receives money or benefits in return for that act. (Id.). Good offices means "mediating or supporting a specific matter at a negotiation in such a way to offer convenience to a bribe-giver or to a third party." (Id.).

Choe is accused of performing "good offices", or, being the "mediator" in the selection of Alsthom as the train supplier. The selection of Alsthom was a "specific matter" or duty belonging to a public official, namely, the Minister of Construction and Transportation, whose duty it was to oversee Korea's high speed rail project. (*See* FEP at 86; Govt.'s Reply at 9-10.). Choe allegedly performed "good offices" when he devised the scheme with Ho to bribe Hwang, a government official, to exert his influence on behalf of Alsthom, in order to "offer convenience" to Alsthom, the "bribe-giver." Thus, when Choe received money from Alsthom as reward for securing the high speed rail contract, he committed the crime of acceptance of bribe through good offices.

Choe argues, however, that the dual criminality element is not satisfied because it is not illegal in the United States to accept payment for lobbying government officials on behalf of private companies. (Opposition at 17). Choe is correct that it is the specific act of accepting money from Alsthom which forms the basis of this offense. Nevertheless, the United States contends, and this Court agrees, that this same conduct, had it occurred here, would constitute wire fraud involving the deprivation of honest services (18 U.S.C. §§ 1343, 1346).[5] (Govt.'s Reply at 10). Sections

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[5] The United States also asserts that Choe's conduct violates 18 U.S.C. § 202 (Bribery); 18 U.S.C. § 666 (Bribery Concerning

1343 and 1346[6] prohibit fraudulent schemes, furthered by the transmission of funds by wire, to deprive the public of "the intangible right of honest services". 18 U.S.C. §§ 1343, 1346.

After Choe agreed to lobby on behalf of Alsthom, Choe allegedly approached Hwang, a high-ranking government official, and asked him to exert his influence on behalf of Alsthom. (FEP at 76). Korea asserts that Choe promised Hwang significant compensation in exchange for Hwang's political influence. (Id.). Choe's role as a middleman in a bribery scheme to improperly give Alsthom the advantage in winning a government contract is a scheme to "deprive another of the intangible right of honest services." Choe "cause[d] to be transmitted by means of wire" the money he accepted from Alsthom, by willingly participating in the fraudulent scheme. Thus, the allegations made by Korea establish that Choe's conduct is considered criminal in both contracting states.

Similarly, Choe's argument that the United States and Korean statutes are not "substantially analogous" also fails. *See* Treaty, art. 2(3)(b) (c); *see also*

Programs Receiving Federal Funds); and 18 U.S.C. § 1951 (Hobbs Act).

[6] 18 U.S.C. § 1343 provides, in relevant part, that: "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate commerce, any writings, signs, signals, pictures or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both."

18 U.S.C. § 1346 states that the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

Khan, 993 F.2d at 1372 (Pakistani law of conspiracy not sufficiently analogous to United States' separate crime of using a telephone to facilitate a drug offense). The focus of the dual criminality requirement is on the conduct charged. The statutory elements of the two crimes need not be identical. In *Theron v. U.S. Marshal*, 832 F.2d 492, 497 (9th Cir. 1987), the court held that a South African statute, which criminalized the failure of an adjudicated insolvent to disclose his insolvency when obtaining credit, was substantially analogous to 18 U.S.C. § 1014, which criminalizes knowingly making false statements to a bank. The court explained that, while "South Africa's law is broader than section 1014 . . . both laws can be used to punish the failure to disclose a loan applicant's liabilities to a bank while obtaining credit." *Id; see also Clealry v. Gregg*, 138 F.3d 764 (9th Cir. 1998) (upholding extradition even though requesting nation's murder statute was broader than felony murder because facts alleged murder took place during robbery); *In re Russell*, 789 F.2d 801, 803 (9th Cir. 1986) (upholding extradition for conspiracy even though overt act was not required in requesting nation because request alleged several overt acts). Here too, violation of acceptance of bribe through good offices criminalizes a broader range of conduct than that which constitutes an offense under 18 U.S.C. §§ 1343, 1346. However, the two laws are sufficiently analogous because they both punish acts of the same general character - accepting money in furtherance of a scheme to improperly influence government officials engaged in fraudulent behavior with respect to the duties of their office. It is immaterial that the scope of criminal liability is not coextensive. *See Collins*, 259 U.S. at 312. Accordingly, this Court finds

that Korea has satisfied the dual criminality requirement with respect to the first alleged offense.

2. Offering a Bribe to a Public Official

This Court finds, and Choe does not contest, that Korea's allegations of Choe's conduct as to the second offense satisfy the dual criminality requirement.

3. The Stowaway Control Act

Choe also contends that dual criminality does not exist with respect to his illegal departure from Korea because there is no substantially analogous law in the United States which seeks to criminalize the same conduct. (Opposition at 30-33).

The Stowaway Control Act prohibits crossing of the territorial border, on a deserted ship or airplane, without valid documents or government permission. (FEP at 87). According to Korea's formal papers, the purpose of the law is "to prevent a Korean national from entering a territory outside the Republic of Korea without undergoing proper procedures." (FEP at 88). The United States argues that dual criminality is satisfied because Choe's conduct, had it occurred here, would have violated 18 U.S.C. § 1073, which prohibits unlawful flight to avoid prosecution. (Govt.'s Reply at 17).

The United States is correct that Choe fleeing Korea in order to dodge a criminal investigation pending against him would constitute unlawful flight under 18 U.S.C. § 1073. Nevertheless, this Court is not aware of any substantially analogous United States statute which has been enacted to punish conduct of the same general character as the Stowaway Control Act - simply preventing U.S. nationals from crossing the border without proper documentation. Thus, this

Court is not entirely convinced that the "substantive conduct each statute punishes is functionally identical" and consequently, that the dual criminality requirement is met with this offense. *See Cucuzzella,* 638 F.2d at 108. However, since this Court finds that Choe may be extradited on the first two offenses alleged, this Court need not decide whether Choe's violation of the Stowaway Act is an extraditable offense.

F. Probable Cause

The government requesting extradition has the burden of producing "such information as would provide reasonable grounds to believe that the person sought has committed the offense for which extradition is requested." Treaty, art. 8(3)(c); *see also Barapind,* 360 F.3d at 1068-70 (the probable cause element requires the extradition magistrate to find reasonable ground to believe the accused is guilty of the crimes charged). The burden is met if there is any evidence warranting the extradition court to make such a finding. *See Barapind,* 360 F.3d at 1068; *Quinn,* 783 F.2d at 790 (citing *Fernandez v. Phillips,* 268 U.S. 311, 312 (1925)). Further, the requesting nation is not required to present all of its evidence at an extradition hearing. *Quinn,* 783 F.2d at 815. An extradition magistrate "does not weigh conflicting evidence and make factual determinations." *Id.* The ultimate question of guilt or innocence is left to the country requesting extradition. *See e.g., Collins,* 259 U.S. at 316; *Quinn,* 783 F.2d at 815. Moreover, it is well-settled that the rules of evidence, other than with respect to privileges, do not apply in extradition proceedings. FED. R. EVID. 110(d)(3); *See e.g., Collins,* 259 U.S. at 317 (unsworn statements of absent witnesses may be acted upon by extradition magistrate

although they could not have been received by him under the law of the state on a preliminary examination); *Mainero v. Gregg,* 164 F.3d 1199, 1206 (9th Cir. 1999) (evidence in an extradition proceeding is not incompetent simply because it is hearsay); *Emami,* 834 F.2d at 1451 ("In the Ninth Circuit it has been repeatedly held that hearsay evidence that would be inadmissable for other purposes is admissible in extradition proceedings").

1. Acceptance of Bribe Through Good Offices

Choe argues that because dual criminality is premised on an alleged bribe to a government official, there must be evidence presented that would justify holding Choe for trial in the United States for bribing Hwang. (Opposition at 20). Choe misstates the law.

Contrary to Choe's assertion, the Treaty only requires that a request for extradition be supported by such information as would provide probable cause to believe that the person sought "has committed *the offense for which extradition is requested.*" Treaty, art. 8(3)(c) (emphasis added). Courts interpreting the probable cause requirement have likewise explained that the evidence must simply demonstrate that there is reasonable grounds to believe "the accused has committed the crime *charged.*" *Quinn,* 783 F.2d at 783 (citing *Glucksman v. Henkel,* 221 U.S. 508, 512 (1911)); *Sakaguchi v. Kaululukui,* 502 F.2d 726, 729-31 (9th Cir. 1975).

There is ample information provided by Korea to support a reasonable belief that Choe accepted money from Alsthom in violation of Korean law. Ho testified that she and Choe met with Alsthom where they were promised money in exchange for lobbying government officials for the rail contract. (FEP at 80). Ho

further testified that she and Choe approached Hwang about exerting his influence on behalf of Alsthom. (Id.). A few months after Alsthom was awarded the contract, Alsthom transferred approximately $11,000,000 into Choe's account. (Id.). Alsthom CEO Ambroise Jean Cariou confirmed that Alsthom paid Choe in exchange for his lobbying efforts. (Id.). In addition, Korea has provided copies of the bank records which show Alsthom's transfer of money to Choe's Hong Kong account, and Choe's subsequent transfer of money to Ho's Hong Kong account. (FEP at 55-64, 80). Thus, this Court finds that probable cause exists to believe that Choe is guilty of the first offense charged.

2. Offering a Bribe to a Public Official

The only evidence of Choe's bribery of a police officer proffered by Korea are excerpts of incriminating statements, recounted by the prosecutor, made by alleged co-conspirators Ki Choon Ho and Sang In Kim, and Hee Bong Park. (FEP at 82-84). No original statements or trial transcripts were submitted. Choe contends that the evidence submitted with respect to the second offense is neither sufficiently competent nor sufficiently reliable to establish probable cause. (Opposition at 26).

In relevant part, Korea's formal papers set forth the following facts in support of its request for Choe's extradition for the bribery of a police officer:

Ho's statement recounts how she and Choe agreed in November 1995 to a pay police to stop the investigation of money transferred by Alsthom. (FEP at 82). Ho admits that, after consulting with Choe, Sang In Kim introduced her to Officer Jeon, who agreed to use his influence to close the case in exchange for 80

million won (approximately $80,000), paid in installments. (Id.). Ho further stated that Choe remitted his one-half share of the bribe money to Ho on March, 27 1996. (Id.). The Prosecutor explained that the aforementioned facts were testified to by Ho at her trial, held June 16, 2000. Ho was convicted of violation of acceptance of bribe through good offices and bribe-offering to a public official. (FEP at 74). Ho was reportedly sentenced to 18 months imprisonment with suspension of its execution for two years. (Id.). Korea also submitted a copy of Ho's March 1996 bank statement showing a transfer of $45,000 to Ho by Choe. (FEP at 64).

Kim's statement, also recounted by the prosecutor in Korea's formal papers, explains how Kim was asked by Ho to introduce her to a high-ranking police officer working in the foreign affairs department. (FEP at 83). Kim admits that he introduced Officer Jeon to Ho, where he witnessed Ho ask Officer Jeon to stop the investigation into the money wired by Alsthom without any further investigation. He states that he saw Ho pay Officer Jeon 30 million won at that meeting. (Id.). Kim further states that he personally made a second payment of 30 million won to Officer Jeon, on behalf of Ho, in February 1996. (Id.). These facts are reportedly taken from Kim's testimony at Ho and Officer Jeon's bribery trials, held July 14, 2000.

A final excerpted statement by Hee Bong Park, a police officer in charge of the investigation of money wired to Choe and Ho's Hong Kong accounts, was submitted by Korea. (FEP at 83-84). In this statement, Officer Park states that during the investigation of Choe and Ho, he and Officer Jon Tae Kim were asked by Officer Jeon to only make "light"

inquiries into the matter so that Ho could not be charged. (Id.). According to the prosecutor, Officer Kim corroborated Officer Jeon's statements. (Id.).

a. Competency of the Evidence

Contrary to Choe's assertion, the fact that Korea has only submitted testimony as recited by the prosecutor does not render that testimony incompetent or otherwise inadmissable in this proceeding. An extradition request may be based entirely on an investigator's affidavit summarizing other witness' statements and information, as long as such evidence is properly authenticated. *Emami*, 834 F.2d at 1451 (foreign prosecutor's affidavit with summaries of statements admissible); *Zanazanian v. U.S.*, 739 F.2d 624, 627 (9th Cir. 1984) (police reports containing multiple hearsay considered sufficiently reliable to be competent). Evidence presented in Korea's formal extradition papers are facially authenticated under 18 U.S.C. § 3190, which provides, in relevant part, that:

> "The certificate of the principal diplomatic or consular officer of the United States who is resident in the demanding country constitutes proof that the documents offered are properly authenticated. Under this statute, a consular certificate is conclusive proof that the documents have been properly authenticated as admissible in a criminal proceeding in the demanding country, and the accused is not allowed to present testimony that the documents would not be admissible under the law of the foreign country."

Article 9(a)(b) of the Treaty incorporates the same principles of authentication by requiring that the documents accompanying the extradition request be

admitted into evidence in an extradition proceeding when "they are certified by the principal diplomatic or consular officer of the Requested State resident in the Requesting State; or [when] they are certified or authenticated in any other manner accepted by the law of the Requested State."

The documents submitted by Korea in support of its extradition request were certified on September 15, 2005, by the Consular General in Seoul, who at the time of certification, was the principal consular officer of the United States in Korea. (FEP at 29). Thus, any attack by Choe on the competency of the evidence as such must fail.

b. Reliability of the Evidence

Choe further argues that, even if the prosecutor's recitation of witness statements is deemed competent evidence, those statements, and Ho's in particular, are not sufficiently reliable to establish probable cause. (Opposition at 26)

Specifically, Choe contends that it is impossible for this Court to make a fair assessment of the reliability of Ho's statement without examining the complete transcript of her testimony. (Opposition at 26). It is well-settled, however, that self-incriminating statements made by accomplices are sufficient to establish probable cause at an extradition hearing. In *Zanazanian,* the Ninth Circuit held that unsworn, unsigned police reports containing recitations of partial confessions of the fugitive's alleged accomplices were not too unreliable to establish probable cause. *Id.* Indeed, the court found that "the fact that they were given to police and incriminated the speakers themselves sufficiently indicates their reliability." *Id.* Similarly, in *Emami,* the Ninth Circuit, relying on *Zanazanin,*

held that hearsay statements summarized in a German prosecutor's affidavit provided reliable evidence to support a finding of extraditability. *Emami,* 834 F.2d at 1450-52. Nothing in this case militates a different result.

Finally, Choe argues that the reliability of the statements submitted is further undermined by the apparent contradictions in the witness' testimony. (Opposition at 27-8). Although the fugitive in an extradition proceeding may offer explanatory evidence that would completely negate probable cause, evidence which merely contradicts the government's evidence, or otherwise establishes an affirmative defense to the charges, is inadmissable. *See Barapind v. Enomoto*, 400 F.3d 744, 749 (9th Cir. 2005) (en banc); *Hooker v. Klein,* 573 F.2d 1360, 1368 (9th Cir. 1978); *Mainero,* 164 F.3d at 1207 n.7. Thus, impeachment of the credibility of the requesting country's witnesses is not permitted. *See Collins,* 259 U.S. at 316.

Choe is correct that Ho's uncorroborated testimony is the sole evidence implicating Choe in the scheme to bribe Officer Jeon. Also, Ho's testimony may conflict with Kim's testimony. As Choe points out, Ho testified that she paid Officer Jeon in installments, and that she personally delivered the money on December 14 and 30, 1995. (FEP at 82). However, Kim testified that he personally made a payment to Officer Jeon in February 1996. (FEP at 83).

Here, Choe's challenges to the sufficiency of evidence based on the apparent contradictions in testimony and uncorroborated accounts of his involvement does not explain away Korea's evidence. Indeed, Choe does not even refute the evidence presented by Korea. Instead, Choe simply attacks the credibility of witnesses and, somewhat persuasively, exploits the

apparent weaknesses in the government's case against him. As a result, Choe's probable cause arguments may be effective in impeaching Ho and others at trial, and they may raise disputed issues of fact helpful to his defense. However, such arguments do not help him in this proceeding, where the Court must not "weigh conflicting evidence and make factual determinations" that will be made at trial in the requesting state. *Quinn,* 783 F.2d at 815.

Thus, this Court finds that Korea has met its burden in producing competent and reliable evidence showing that there is reasonable ground to believe Choe is guilty of bribing a police officer in violation of Korean and U.S. law.

G. Statute of Limitations

Finally, Choe asserts that article 6 of the Treaty bars his extradition as to all three offenses. (Opposition at 2, 10-12). Article 6 provides, that:

> Extradition may be denied under this Treaty when the prosecution or the execution of punishment of the offense for which extradition is requested would have been barred because of the statute of limitations of the Requested State had the same offense been committed in the Requested State. The period during which a person for whom extradition is sought fled from justice does not count towards the running of the statute of limitations. Acts or circumstances which would suspend the expiration of the statute of limitations of either State shall be given effect in the Requested State, and in this regard the Requesting State shall provide a written state-

> ment of the relevant provisions of its statute of limitations, which shall be conclusive.

(FEP at 20).

It is uncontested that the statute of limitations for Choe's alleged crimes, had they been committed here, is five years. 18 U.S.C. § 3282. Korean law provides for a five year statute of limitations for the first two offenses, acceptance of a bribe and offering a bribe to a public official, and a three year statute of limitations for the third offense, violation of the stowaway act. (FEP at 88-89). The limitations period begins to run after the criminal act is completed, and in this case, commenced on May 16, 1995, December 30, 1995, and December 1999, respectively. (FEP at 89). Without interruption, under both Korean and U.S. law, the limitations period would have expired for the first two offenses on May 15, 2000 and December 29, 2000. (*See* FEP at 90). With respect to the third offense, under U.S. law the limitations period would have expired on December 30, 2004, and under Korean law, December 30, 2002. (Id.). In its formal papers, however, Korea explains that because Choe fled the country in December 1999 to avoid prosecution for the first two bribery offenses, the limitations period was tolled at the time of flight. (Id.). United States law would similarly stop the clock for any person found "fleeing from justice." § 18 U.S.C. 3290. In order to toll the limitations period for this reason, the government must prove that Choe fled Korea with the intent to avoid prosecution by a preponderance of the evidence. *See Quinn,* 783 F.2d at 817.

Choe claims that the government lacks the proof necessary to establish that the limitations period was tolled when he illegally left Korea in December 1999. (Opposition at 11). A person must know that he is

wanted by the authorities in order to be deemed a fugitive. *Quinn*, 783 F.2d at 816, n. 38 (citing, *U.S. v. Gonsalves*, 675 F.2d 1050, 1053 (9th Cir. 1982)). Choe accurately points out that, at the time he left Korea, there were no charges pending against him, the departure prohibition had expired, and there had not been any arrests in connection with the offenses for which he is now wanted. (Opposition at 12). Moreover, Choe asserts that, contrary to Korea's claim, there is no proof that he disobeyed a summons to appear at the prosecutor's office, issued after his last interrogation in October 1999. Indeed, no such summons has been provided in Korea's formal papers. Thus, Choe argues that he never received notice that he was wanted by the Korean authorities until his arrest on February 16, 2006. (Id.).

Choe does ignore, however, that while no formal charges had been initiated against him, he had been aware, since at least October 1999, that the authorities had re-opened the investigation against him of the 1995 transfer of money from Alsthom. (*See* FEP at 73). In addition, shortly before he left Korea, both he and Ho had been interrogated by prosecutors with respect to both bribery charges. (FEP at 74). While Choe is correct that it does appear as if the departure prohibition had expired when he left Korea, his surreptitious departure, without the return of his confiscated passport, or any legal documents permitting his leave, in conjunction with all other facts, lends compelling support to the inference that he fled the country with the intention of avoiding detection by the authorities. Moreover, this Court has already found that reasonable grounds exist to believe that Choe bribed a police official to close the initial 1995 investigation. While the Court agrees that there is no evidence to support the prosecutors assertion that

Choe ignored a summons to appear, such a finding does not change this Court's conclusion that the government has met its burden of showing that Choe, more likely than not, left Korea in order to avoid prosecution. Thus, this Court concludes the there are no applicable statutes of limitation which bar Choe's extradition.

III. Findings, Conclusions And Certification

For the reasons discussed above, the Court grants Korea's request for Choe's extradition and makes the following findings and conclusions in support of this Memorandum and Order:

1. This Court has jurisdiction over the proceedings;

2. This Court has jurisdiction over Man Seok Choe;

3. There is a valid extradition treaty between the United States and the Republic of Korea in full force and effect;

4. The Korean offense of Accepting a Bribe Through Good Office and Offering a Bribe to a Public Official are extraditable offenses consisting of conduct considered to be criminal in both the United States and the Republic of Korea, and which are punishable by deprivation of liberty for a period of more than one year;

5. There is probable cause to believe that Choe committed the crimes of Accepting a Bribe Through Good Office and Offering a Bribe to a Public Official;

6. There are no applicable treaty provisions which bar extradition; and

7. The Republic of Korea's formal papers and documents in support of its request for Choe's extradition are and have been presented in accordance with the laws of the United States of America and the Treaty, and have been translated and authenticated in the manner required by the Treaty.

The Court hereby certifies the above findings and conclusions, and the transcripts of the extradition hearing held in this case, to the Secretary of State, pursuant to 18 U.S.C. § 3184.

IV. Warrant of Commitment

The Court further orders that Choe shall be committed to custody, as required under 18 U.S.C. § 3184, and that he remain in such custody until he is surrendered to the Republic of Korea, or until further order of the Secretary of State.

DATED: October 6, 2006

/s/ Marc L. Goldman
Marc L. Goldman
United States Magistrate Judge

APPENDIX F

Statement of Confirmation

I, Kwang Soo OH; Prosecutor of the Central Investigation Department at Supreme Prosecutor's Office of the Republic of Korea, confirms as follows, in support of the request for the extradition of Man Seok CHOE from the United States of America to the Republic of Korea.

* * *

2.2.6. On May 10, 2000, Prosecutor Yong Seok PARK arrested and indicted Ki Choon HO for violation of Act on the Aggravated Punishment, etc. of Specific Crimes (Acceptance of Bribe through Good Offices) and Bribe-Offering of the Criminal Act, Yoon Ki JEON for violation of Act on the Aggravated Punishment, etc. of Specific Crime (Bribe). On January 22, 2001, the Prosecutor arrested and indicted Myung Soo HWANG for violation of Act on the Aggravated Punishment, etc. of Specific Crime (Acceptance of Bribe through Good Offices)

* * *

2.2.8. On February 22, 2001, the Seoul High Court sentenced Ki Choon HO to 18 months of imprisonment and suspension of its execution for two years, and Yoon Ki JEON to 5 years of imprisonment. The above sentences were settled as they were. On Oct. 9, 2001, Seoul High Court sentenced Myung Soo HWANG to 2 and half years of imprisonment and suspension of its execution for four years; and this sentence was settled afterward.

5.1. Man Seok CHOE is a male national of the Republic of Korea who was born in Korea on

March 20, 1941. Man Seek CHOE has black hair and brown eyes. He is an Asian who has a paunch, is slightly fat, 175cm (5.74ft) tall and weighs about 80 kilograms (176.6lb). Man Seok CHOE's English name is Peter M CHOE and his address in the U.S. was 4486 EMERALD ST. TORRANCE CA. 90503. Annex 8 is a genuine and accurate copy of CHOE's photograph; Annex 9 is a genuine and accurate copy of CHOE's U.S. driver's license.

5.2. Man Seok CHOE went to the U.S. around December 21, 1992 and established BRANSON International Inc. at the place of the above address. He ran a real estate business there and returned to Korea on January 10, 1993. Man Seok CHOE ran a real estate investment business in Korea, and became acquainted with some important figures in politics after participating in the presidential election campaign in 1992. Later, Man Seok CHOE committed the crime of the case and fled to the U.S. around December of 1999 in an unknown way.

5.3. Man Seok CHOE is currently presumed to be living in the suburbs of L.A. His family members cohabiting with him are his wife Moon Ja CHOI (born on February 15, 1943) and his son Wilson CHOE (born on October 27, 1971). Moon Ja CHOI's cellular phone number is known as 213-453-7595.

5.4 According to recent intelligence on Man Seok CHOE's course of action, he applied for U.S. citizenship at the USCIS (Citizenship and Immigration Services) in Hawaii after his illegal flight to the U.S. On 12 February 2001, he was to have an interview in order to obtain

the citizenship in El Nonte, L.A., California. But it is known that the interview was postponed.

* * *

6.5 Judge Jae Hyup KIM of Seoul Central District Court issued warrant of arrest for Man Seok CHOE, which Prosecutor Chan Woo KANG had requested on March 16, 2005 and its term of validity is until March 15, 2006. The above warrant of arrest is a judicial document that authorizes the arrest of Man Seok CHOE for his violation of the Act on the Aggravated Punishment, etc. of Specific Crimes (accepting a bribe for good offices), the Criminal Code (bribery), and the Stowaways Control Act. Sae Hyup KIM, Judge of Seoul Central District Court, has the authority to issue the warrant of arrest in accordance with the laws and ordinances of the Republic of Korea. The original copy of the warrant of arrest is attached to the investigation record for the proceeding in Korea. I have verified the original copy of the warrant of arrest, and as mentioned before, Annex 1 is the genuine and accurate copy of the warrant of arrest.

* * *

7. The abovementioned are all true to my knowledge. I am submitting this statement of confirmation, being well aware that I can be punished under Article 227 of the Criminal Code of the Republic [of] Korea if I purposefully make false statement.

June 10, 2005
Prosecutor Kwang Soo OH
The Central Investigation Department of
The Supreme Prosecutors' Office

APPENDIX G

DECLARATION OF CHAIBONG HAHM

I, CHAIBONG HAHM, declare as follows:

1. I am the Director of the Korean Studies Institute, Professor in the School of International Relations and the Department of Political Science at University of Southern California.

2. My area of expertise is Korean politics, political history, political theory and culture. From 1992 to 2005, I was an Assistant, Associate, and Full Professor in the Department of Political Science at Yonsei University, the leading private university in South Korea. From 2003 to 2005, I was on leave from Yonsei to serve as the Director of Social Sciences, Research and Policy at the United Nations Educational, Scientific, and Cultural organization (UNESCO) in Paris, France. I have also been a Visiting Fellow at the International Forum for Democratic Studies in Washington, DC, and a Visiting Professor at Duke, Princeton and Georgetown Universities. I have authored and edited several books on Korean politics and culture in both English and Korean. I have lectured widely and have written for both academic and non-academic audiences. A copy of my curriculum vitae is attached.

3. I prepared the nine page report that is attached to this declaration it the request of counsel for Man-Seok Choe, Mr. William J. Genego. The report discusses the nature of the relationship between government and business in South Korea in recent years. It is my understanding that the report is to be submitted to the Court in connection with the judicial proceedings involving South Korea's request for the extradition of Man-Seok Choe.

4. In preparing the report, I have reviewed the material provided me by the counsel including: - Notice to consolidate; - Filing of Original Formal Extradition Papers and Request for Extradition; - Declaration of Virginia P. Prugh; - Request for Extradition and annexes issued by the Ministry of Justice of Korea; and - Extradition Treaty Between the Government of the United States of America and the Government of the Republic of Korea signed on June 9, 1998.

5. The facts stated in the report are based either on my personal knowledge or on reliable sources of information that I believe to be true. Statements of opinion expressed in the report are based on my knowledge and experience as a scholar in Korean politics, political history, political theory and culture.

I declare under penalty of perjury that the foregoing is true and correct.

Signed this 1 day of August, 2006 at Seoul, Korea.

/s/ Chaibong Hahm
Chaibong Hahm

* * *

Kim Young-sam v. Kim Dae-jung,

Ever since the early 1960s, Kim Young-sam and Kim Dae-jung championed democracy in South Korea. Leading up to, the presidential elections of 1969, the two Kims competed to become the opposition New Democratic Party's presidential candidate. When Kim Dae-jung won in a surprising party vote, Kim Young-sam, though bitterly disappointed, quickly conceded defeat and campaigned vigorously for Kim Dae-jung during the subsequent presidential campaign. Even though Kim Dae-jung was defeated by President Park who was then running for a third term, the alliance between the two Kims had been cemented. Indeed, during the dark years of the Park's tenure, whose rule became increasingly authoritarian and then overtly dictatorial in 1971 when he declared martial law, disbanded the National Assembly and jailed prominent opposition leaders, the two Kims joined hands in their long and arduous struggle for democracy. Thus the two Kims came to symbolize South Korea's hope for democracy.

Their struggles ultimately proved successful when President Chun Doo-whan finally conceded to public demands for direct presidential elections in 1987. A new era of democracy was opened. The two Kims were in the best position to lead the country into this new age of democracy for which they had fought so hard and effectively. When the incumbent party fielded Roh Tae-woo, a crony of Chun Doo-whan's, as its presidential candidate, the election of the candidate from the opposition seemed to be a sure thing. Given the stature of the two Kims, the election of either of them seemed all but guaranteed, as long as

they could agree on which among them would run for the presidency. Here, however, troubles began.

Each confident of his own standing and egged on by a growing sense of rivalry, the two Kims failed to join hands to field a single candidate. Instead, both ran, splitting the opposition camp in two. When the votes were tallied Roh won 36.6% of the votes, Kim Young-sam 28%; and Kim Dae-jung 27%. Given that the election law mandated a simple majority, there was no run-off election and Roh, a former army general who had participated in a coup d'etat, won the presidency against the two most prominent and powerful politicians in South Korea at the time. There was no doubt in anyone's mind that had the two Kims joined forces, they would have won the election hands down. The two Kim bitterly accused each other for betraying the cause of democracy and the people.

In 1990, President Roh's ruling party suffered a major defeat in the National Assembly elections by winning only 125 seats (it had 148 seats entering the election), 25 seats short of the majority. Roh reached out to Kim Young-sam to merge their two parties (along with a third party led by former President Park's lieutenant Kim Jong-pil) to form a mammoth majority party with 218 seats. This political merger left Kim Dae-jung's party as the sole opposition party. It was with the help of this coalition that Kim Young-sam was finally able to win the presidency in 1992.

After his defeat in the elections; Kim Dae-jung announced his retirement from politics and left the country on a year-long sojourn abroad. However, in 1995, Kim Dae-jung reversed his decision to retire from politics and formed his own party. Then in the presidential elections of 1997, he formed an alliance

with Kim Jong-pil, former President Park's lieutenant who had joined the political alliance with Roh Tae-woo and Kim Young-sam back in 1990. The elections took place in the midst of the East Asian Financial Crisis which exposed the incompetence of the government and the ruling coalition which was also split as a primary candidate, Lee In-je, refused to submit to the results of the primary which chose Lee Hoe-chang as the party's candidate. Kim Dae-jung thus was able to win the presidency after four tries.

Once Kim Dae-jung came to power, many of the business deals that were made and companies that prospered under the previous governments were put under scrutiny.

* * *

APPENDIX H

I, Ung Lee, declare as follows:

* * *

9. It was widely known that the President finally selected Alstom and announced it on June 14, 1994 after receiving a report that Alstom was the company who offered the price lower by $300,000,000 and better technology transfer conditions.

* * *

I declare- under penalty of perjury that the foregoing is true and correct.

Signed this 2nd day of June 2006 at Orange, California:

/s/ [Illegible]
Signature

APPENDIX I

DECLARATION OF VIRGINIA P. PRUGH

I, Virginia P. Prugh, declare and say as follows:

* * *

2. In accordance with the provisions of the extradition treaty in full force and effect between the United States and the Republic of Korea, the Embassy of the Republic of Korea has submitted diplomatic note no. KAM 05/528 dated September 28, 2005, formally requesting the extradition of Man Seok Choe. A copy of the diplomatic note is attached to this declaration.

* * *

I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on October 12th, 2005.

/s/ Virginia P. Prugh
Virginia P. Prugh

Attachments:

1. Copy of Note
2. Copy of Treaty